



A PROFESSIONAL
LAW CORPORATION

201 South Main Street
Suite 1800
Salt Lake City, Utah 84111
Telephone 801.532.1234
Facsimile 801.536.6111
pbl@parsonsbehle.com

Lisa A. Kirschner

Direct Dial
(801) 536-6649
E-Mail
L.Kirschner@parsonsbehle.com

January 14, 2010

VIA ELECTRONIC MAIL
cbittner@utah.gov

Christopher Bittner
Utah Division of Water Quality
288 North 1460 West
Salt Lake City, Utah 84116

**Re: Amendments to Utah Administrative Code - R317-1 and R317-2:
Comments of Kennecott Utah Copper LLC**

Dear Mr. Bittner:

The following comments on the above-referenced rulemaking are timely submitted to the Division of Water Quality ("DWQ") on behalf of Kennecott Utah Copper, LLC ("Kennecott"). Some of these comments reiterate issues raised by Kennecott throughout the triennial review process regarding certain antidegradation-related provisions of the proposed rule; Kennecott respectfully requests further consideration of the same.

The September 30, 2009 letter from EPA Region 8's Carol Campbell approves the water quality standards adopted by the Water Quality Board on November 10, 2008 with three exceptions. In particular, EPA's letter reflects: a determination to take "no action" on the Gilbert Bay selenium water quality criterion; and two antidegradation-related disapprovals. The antidegradation rulemaking disapprovals are addressed by the proposed rule in two different ways. The following comments address the two antidegradation rulemaking disapprovals and a separate antidegradation-related implementation provision (unrelated to EPA's disapproval and independently inserted in the rulemaking effort by DWQ).

Level II Offramps - R317-2-3.5. EPA specifically disapproved one of the regulatory "offramps" exempting certain specific discharges (based on implications for the assimilative capacity of the receiving water) from being subject to a more detailed antidegradation Level II review. *See* Utah Admin. R317-2-3.5.b.5. The disapproved offramp is correspondingly and appropriately stricken in the revised rulemaking package.

Egg Concentration Triggers – R317-2-14 (Table 2.14.2 fn 14). Whereas EPA did not take action on the selenium criterion, it did disapprove one aspect of the rule's

Christopher Bittner
January 14, 2010
Page Two

implementation methodology specifically related to that criterion. In particular, EPA disapproved the bird egg concentration trigger (of 6.4 mg/kg) that would require DWQ to conduct an antidegradation Level II review for all Great Salt Lake-related discharge permit renewals or new discharge permits and which “may include an analysis of loading reductions.” In spite of EPA’s specific comments, DWQ has proposed no corresponding change to the rule provision. Since EPA disapproved this provision, Kennecott requests that the provision be stricken from rulemaking. Indeed, Kennecott believes that the EPA comment letter lends further support for Kennecott’s longstanding request that any implementation procedures be incorporated in guidance and not in rule.

As recognized by the Utah Supreme Court, rulemaking implementation can be covered by guidance where it provides internal direction to the agency that is not binding on the agency. *Sierra Club v. Air Quality Board*, 2009 UT 76 (Dec. 4, 2009) at ¶50. The identification of measures to ensure ongoing compliance with any water quality criterion (and DWQ’s response actions) constitutes internal implementation of a water quality rule. As suggested by the Court, compliance measurement (as opposed to the establishment of compliance criteria) constitutes internal agency governance and is not, therefore, rulemaking. *Id.* at ¶52. Correspondingly, Kennecott believes that as additional selenium data are collected and DWQ’s understanding of the same becomes increasingly robust, DWQ will have a panoply of possible means for assessing and implementing responses to changes in egg concentrations of selenium, should that occur. Kennecott suggests that the rule’s “one size fits all” responses to specific egg concentrations of selenium (and which relate to a standard that EPA has not yet approved) are better off documented in guidance; a well crafted guidance document can identify options likely to elicit the most targeted, effective responses and can evolve most flexibly with the development of pertinent information.

Implementation Procedures – Utah Admin. R317-2-3.5.f. Although not required by EPA, the draft rulemaking also includes changes consisting of a new section titled “implementation procedures.” This provision would require that the Executive Secretary develop specific guidance for implementing Level II antidegradation review requirements. The proposed language dictates the components of the guidance; it is, however, not clear why any guidance document needs to be mandated by rule and, as drafted, the proposed language could be inappropriately limiting in a number of ways. For example, the proposed rule would require the Executive Secretary prepare guidance “for completing technical, social, and economic need demonstrations.” As you are aware, the existing antidegradation rules already include information on “feasible” economic alternatives. *See, e.g.*, Utah Admin. R317-2-3.5.c.2. Similarly, the proposed language would require the Executive Secretary prepared guidance “for determination of additional treatment alternatives.” In

Christopher Bittner
January 14, 2010
Page Three

fact, the existing rules already specify the list of alternatives (with respect to treatment options). *See id.* Whereas guidance may be able to provide some helpful direction on implementing these rule provisions, DWQ will need to assess how the draft rules' required guidance would interface with what is currently already designated in rule. That issue may be less complicated by leaving the reference to the guidance out of the rulemaking and allowing the scope/content of guidance to develop as part of an independent, transparent process.

The proposed rule language would also require that any guidance "consider" federal guidance. The cross reference to federal guidance is flawed for at least two reasons. First, since there is no existing federal guidance, the rule would, as finalized, reference a document that does not yet exist (and cannot be evaluated by DWQ staff for relevance to Utah's water quality standards program). Second (and similarly), it is possible that any such guidance may not have direct applicability to Utah's program. As such, any reference to the federal guidance (even if in the context of "considering" the same) is inappropriate.

Finally, the proposed rule's codification of referenced guidance is potentially confusing and misleading. The reference blurs the line between rule and guidance and may create unnecessary miscommunication and potential conflict over what is considered a mandatory regulatory obligation as opposed to optional guidance. This issue is avoidable since the guidance can be developed completely independent of the rulemaking package.

In summary, the reference to mandatory guidance in the draft rule appears to be misplaced. DWQ staff could accomplish its objectives to develop guidance without giving up its flexibility to adapt the scope and content of such guidance to best track the needs of Utah's water quality standards program. Kennecott requests that the reference to antidegradation guidance be eliminated from the rulemaking package.

Thank you for your consideration of these issues.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa A. Kirschner", with a stylized flourish at the end.

Lisa A. Kirschner

LAK/ch